IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 131.

WILLIAM H. McCAFFREY ET AL., APPELLANTS,

vs.

LIZZIE C. MANOGUE ET AL., APPELLEES.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District of Columbia, construing the will of the late Hugh McCaffrey. On July 1, 1902, the appellant, William H., and his brother, James B. McCaffrey, filed their bill in equity against the appellees, and also against the appellants, the Quigleys, setting forth in material substance that they were sons of said Hugh McCaffrey, and that the defendants were his remaining heirs at law, with the exception of the appellee, George W. Manogue, who was alleged to be a purchaser and vendee of all of James B. McCaffrey's interest in his father's estate. That the said Hugh McCaffrey left a will devising certain pieces of real estate separately to each of his children, the said devises in the aggregate comprising all the real estate he owned.

That the will also contained certain bequests of person-

alty which comprised all his personal estate except his household furniture (of small value) and $100 in money.

The evidence shows this to be the true state of case; in fact it was admitted by the adult defendants, and no proof would have been necessary on that point, except that some of the defendants were infants.

The bill further recited that a son, Frank T. McCaffrey, who was left by the will certain real estate, had subsequently died, leaving a will devising all his estate, real, personal and mixed, to his sister, Lizzie C. Manogue (appellee), and his brother William H. That a daughter, Mary A. Quigley, had died, leaving by will all her estate to the appellants, Catherine L. and Edward Quigley, in trust for her children, the other Quigley appellants.

The bill further sets forth that upon proceeding to make sale of the Frank McCaffrey lot, as owners in fee simple by reason of his devise aforesaid, a doubt had arisen as to whether the said Frank T. McCaffrey, or said William H. McCaffrey, either of them, took a fee simple or only a life interest, because of the fact that the several devises of real estate were made without words of inheritance; but that the plaintiffs claimed that the said devises were intended to and did pass a fee simple to each of the devisees, because of the fact that the will imposed on Mrs. Quigley, the first devisee named, the personal duty to pay the funeral expenses and the legal debts of the testator, and that such intention resulting from the said obligation upon her the other devisees of real estate must also be found to take as fee simple devisees, the language as to the devises in all instances being the same.

The bill then proceeded to state that complainants were advised that they were entitled to have Hugh McCaffrey's will construed by the court as to the devises to Francis T. and William H. McCaffrey, and prayed that a decree be passed construing the said will, and declaring that those two took a fee simple.

The infant defendants, Frank Foley and two of the Quigley children, filed formal answers, through their respective guardians *ad litem*, and as to the adult Quigleys a decree *pro confesso* was taken.

The two Manogues filed answers: Mrs. Lizzie Manogue claiming specifically that the several devises only give a life estate, and George W. Manogue making no claim either way, but merely submitting the question of the construction of the will to the court.

Pending the appeal in this court, the appellant James B. McCaffrey died, intestate, and the land devised to him passed to the other parties to the suit either as his heirs at law, or as heirs of Hugh McCaffrey.

The will of Hugh McCaffrey shows the following devise to Mrs. Quigley:

> "I give and bequeath to my daughter, Mary A. Quigley, house number 301 at southwest corner of 4th and C streets southeast, being in lot number 5, square 970, with the store and dwelling, stock, and fixtures, and lot on which its stands; also houses number 13 and 15 6th street southeast, with lots on which they stand, being parts of lots 19 and 20, in square number 841; also any money in bank to my account at the time of my death; also any money due to me; also any building association stock. She is to pay funeral expenses and any other legal debts I may owe, also to care for my lot in Mount Olivet Cemetery."

The devises to William H. McCaffrey and Francis T. McCaffrey are respectively as follows:

> "To my son, William H. McCaffrey, I give and bequeath house 604 East Capitol street, being in lot number ten (10), in square number eight hundred and sixty-eight (868), and lot on which it stands.
>
> "To my son, Francis T. McCaffrey, I give and bequeath house five hundred and nineteen (519) East Capitol street, and lot on which it stands, be-

ing part of lot number twenty (20) in square eight hundred and forty-one (841); also my horse and buggy."

The other devises of real estate to James B. McCaffrey, Lizzie Manogue, and Frank Foley are in phraseology just the same, and there is a bequest to his grandson, Joseph Quigley, of the testator's watch and chain.

The will is dated April 30, 1896, and the testator died March 9, 1897.

The proof taken showed that the testator's personal estate was more than sufficient to pay his debts, and that quite a surplus was turned over to Mrs. Quigley.

The trial court rendered a decree reciting in substance that the several devisees took only a life estate, and decreeing specifically that Francis T. McCaffrey and William H. McCaffrey only took a life estate in their respective parcels.

Afterward the Quigleys filed a motion to strike out the recital aforesaid, on the ground that their title was not involved in the suit, and such recital was contrary to the rules of court; but the motion was overruled. An appeal was taken from the decree to the Court of Appeals, and that court affirmed the decree below.

Assignment of Errors.

The court erred in adjudging that the said Francis T. McCaffrey and William H. McCaffrey, respectively, took only life estates in the properties devised to them.

2. The court erred in giving consideration to the evidence showing the extent of the testator's personal estate.

3. The appellants, the Quigleys, assign as separate error (*a*) the recital in the decree that none of the devisees took more than a life estate; and (*b*) the order of the court overruling the motion to amend the decree by striking out such recital.

ARGUMENT.

The main question involved in this appeal was incidentally or collaterally before the Court of Appeals in McCaffrey *vs.* Little, 20 App. D. C. 116, but was by the court distinctly pretermitted, without any controlling expression of opinion, for the stated purpose of awaiting a proceeding like the present one, which should bring all the parties possibly in interest before the court. In that case the present appellants, William H. McCaffrey and James B. McCaffrey, as devisees of Frank T. McCaffrey, had brought suit against one of the present appellees, Lizzie C. Manogue, the remaining devisee, for partition by sale of the lot devised by Hugh McCaffrey to said Frank, and by him devised to those three.

When the sale was made, the purchaser, Little, set forth these doubts as to the title, and the equity court passed a decree relieving him from the purchase.

From that decree the two McCaffreys and Mrs. Manogue all appealed, she then apparently taking a different view from what she now takes; and the Court of Appeals, in affirming the decree, held that the question was of such doubtful character that a purchaser ought not to be required to assume it, using this language:

> "We are not to be understood as expressing the opinion that Francis T. McCaffrey did not take an estate in fee simple under the will of Hugh McCaffrey. On the contrary, it is probable that such was the intention of the devisor. All that we decide is that the question is not free from doubt, the title is not so clear that the appellee ought to be compelled to accept it and assume the hazard of future litigation with persons not now before the court."

Mrs. Quigley Took a Fee Simple.

The common law principle that a devisee who takes a piece of land subject to any payment, however small, gets a

fee simple, notwithstanding the omission of words of inheritance, is well settled and of ancient standing. It was announced 300 years ago in Collier's case, 6 Coke, 16 (37 Eliz.), to the following effect:

> "A man has issue, a daughter, and by his will devises part of his land to his daughter and the other part to his wife for life; after his death to his brother—paying to one 20s and to others small sums—45s in all. Adjudged that the brother had fee simple. If brother had been only required to pay so much out of the profits, he would only have taken a life estate, for he is sure to have no loss; or if directed to pay so much per annum it would be the same, for he might pay it out of the profits.
>
> "But in case at bar, after the payment he might die before satisfaction and therefore it is a fee simple."

No English case can be found controverting this, and we may incidentally say no American case.

Indeed, this court held in *King* vs. *Ackerman, 2 Black. 408*, that "when a devisee whose estate is undefined is directed to pay the testator's debts or legacies he takes an estate in fee." The court said further in this connection:

> "The rule of law which gives a fee where the devisee is charged with a sum of money is a technical dominant rule, and intended to defeat the effect of the former rule (referring to the omission of words of inheritance) which itself so often defeated the intention of the testator."

There is also a later case in England (1798), where like the present one there is a mixed devise and bequest of realty and personalty in one paragraph.

Doe vs. *Holmes, 8 Durnford & East, 1*, as follows: "I give and bequeath my house and furniture to A, she paying all my debts and legacies."

Held—

> "In cases of this kind the question has always

been whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case the devisee takes only an estate for life, but in the latter he takes a fee, otherwise he might be a loser by the devise. Here the devisee is bound to pay the debts and legacies at all events, and the charge is thrown on her in respect of the real estate."

In Sharswood's edition of Blackstone we find the following note:

"Where an estate is devised, and the devisee is subjected to a charge, which charge is not directed to be paid out of the rents and profits, the devise will carry a fee simple, notwithstanding the testator has added no words of express limitation in perpetuity. Upon this point the distinction is settled that where the charge is on the person to whom the land is devised then he must take the fee; but not where the charge is upon the land devised and payable out of it."

Citing:

Goodlitle *vs.* Maddern, 7 East, 500.
Doe *vs.* Holmes, supra.
Doe *vs.* Clarke, 8 New Rep. 349.
Roe *vs.* Dau, 3 Mau. & Sel. 522.
Baddeley *vs.* Leapingwell, Wilm. Notes, 235.
Collier's Case, supra.

The contention of the appellees is, as we are advised, that because (*a*) in connection with the devise of the land to Mrs. Quigley there is a bequest of personalty, and (*b*) the extrinsic proofs show the personal estate of the testator to have been more than sufficient to pay the charges, the devise of the real estate can not be aided by the fact of the charge upon the devisee, but must be taken strictly according to its words.

The Court of Appeals, after recognizing the rule that—

> "when a devise of lands without words of limitation or description of the extent of the estate to be taken is coupled with a personal charge upon the devisee, in effect a condition of the devise, the operation of such a charge is to enlarge the life estate that would otherwise pass, into a fee simple—"

(Opin. 22 App. D. C. 385), held that because the proofs taken by appellees showed that out of the personal estate bequeathed to Mrs. Quigley "a large surplus must necessarily remain to her after the discharge of all possible demands and expenses" (Rec. p. 394), the charge should be construed as upon the personal estate, and not upon the person (Rec. p. 395).

But the court had no right to look beyond the face of the will in determining its construction, and should have rejected the testimony as wholly incompetent to diminish the estate which the *fact of the personal charge* defined as created in Mrs. Quigley by the terms of the devise.

The court cited no authority for its reception of this evidence and ignored authoritative decisions in doing so.

> King *vs.* Ackerman, 2 Black. 408.
> Barber *vs.* Pittsburgh, etc., Railway, 166 U. S. 109.
> Allen *vs.* Allen, 18 Howard, 385.
> West *vs.* Fitz, 109 Illinois, 438.

In King *vs.* Ackerman, this court said:

> "A court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, *but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised.*"

And in Barber *vs.* Pittsburgh Railway this court said (Rec. p. 109):

> " Evidence of extrinsic circumstances, such as the testator's relation to persons, *or the amount and condi-*

> *tion of his estate,* may be admitted to explain ambiguities of description in the will, but *never to control the construction or extent of devises therein contained.*"

The Court of Appeals, had it rejected the extrinsic testimony as it should, must have held that Mrs. Quigley took a fee.

That the charge was upon the person, and not upon the property devised or bequeathed is certain. The language is: "She is to pay funeral expenses and any other legal debts I may owe; also to care for my lot at Mount Olivet Cemetery;" and the case is clearly within the decision in *King* vs. *Ackerman* and the other cases cited.

In *West* vs. *Fitz, supra,* the Illinois court held that the question of the sufficiency of the testator's other property to pay his debts, in nowise affected the construction of a devise accompanied with a charge on the devisee; and that the will making it a *possibility* that the devisees might have something to pay, must be construed as passing a fee simple.

The authorities are all with us on the proposition.

> 3 Powell on Devises (by Jarman), 379.
> 3 Jarman on Wills, 23.

If the limited construction of the several devises to life estates only is declared, it must result that the testator, Hugh McCaffrey, died intestate as to the remainder after the expiration of the life estates, for there is no residuary devise, or other language to dispose of the remainders. It is unreasonable to suppose that this was the testator's intention, and it gives offense to the well recognized rule that—

> "every testator in the making of his will is supposed to intend to dispose of his entire estate, and the presumption is against his intention to die intestate as to any part of it, unless such intention is plainly expressed or necessarily implied."
>
> Kennedy *vs.* Alexander, 21 App. D. C. 424.
> Hardenburgh *vs.* Ray, 151 U. S. 112.

It is shown here that everything Hugh McCaffrey owned was in some way disposed of by his will, thus adding to the presumption that he intended to dispose of all his estate.

There may be three several conditions or states of affairs arising in relation to a devisee of real estate who is charged with the payment of debts or anything else:

1. A devise merely of real estate.

2. A mixed devise and bequest of real and personal estate in the same clause of the will.

3. Separate devises of real estate and bequests of personalty; making (*a*) the charge in connection with the devise; (*b*) the charge in connection with the bequest.

As we have suggested heretofore, we understand that the counsel for appellees admit that under 1 or 3 (*a*) the fee simple will pass. We concede that under 3 (*b*) the devise would not be enlarged, because the charge would not affect the realty.

And we feel confident that all the authorities that can be cited by appellees will relate to cases arising under 3 (*b*). None other were presented in the lower court, and we know of none.

We are thus remitted to the crucial question whether, in case of a mixed devise and bequest in the same clause, the condition or charge shall be held to relate to the realty as well as to the personalty, regardless of the order in which they are enumerated, and regardless of the value of the personalty.

This question has been authoritatively settled in the affirmative.

In Doe *vs.* Holmes, supra (1798), as we have seen, the words of the will were: "I give and bequeath my house and furniture to A, she paying all my debts and legacies," and it was held that she took a fee simple in the land, even though no real estate was mentioned but the

"house," and although the furniture was also included.

In Abbott *vs.* Essex Co., 18 How. 202, the following clause in a will was involved:

> "I give to my two sons namely, John and Jacob, all my lands and buildings in Andover (excepting the land I gave to my son Thomas), which buildings consist of dwelling houses, barns, corn house, grist mill and cider mill, all of every denomination; also all my live stock of cattle, horses, sheep and swine, and all my husbandry utensils of every denomination, and all my tools that may be useful for tending the mills aforesaid; and also all my bonds and notes of hand and book accounts, together with what money I may have at my decease; and my wearing apparel, I give the same to my said sons, John and Jacob, to be equally divided between them; and in consideration of what I have given my said sons, John and Jacob, the executor of this testament (hereinafter named) is hereby ordered to see that all my just debts and funeral charges, together with all the legacies in this will mentioned, be paid out of that part of my estate I have given to my two sons, John and Jacob, to whom I give each one bed and bedding."

And it was distinctly held that the two sons took a fee simple by reason of the charge made on them, to pay out of "that part of the estate given them" the debts, etc. There is a devise of lands, without words of inheritance, and a bequest of personalty, and in the same clause a charge made, and the court held that a fee passed. If there is any difference in this case and the case at bar, it is in favor of the Quigley devise, because the will says "*she* is to pay,', whereas in the Abbott case the direction is for the executor to pay it out of the devisee's share.

Upon authority and upon principle we submit it must be held that it was the legal intention of the will that Mrs Quigley should take a fee in the land devised to her.

The Other Devisees Took Fee Simples Also.

It is also established that where from the fact of such condition in one of several devises, it is manifest the testator intended to pass a fee in such devise, the fact that in the others he has used similar terms (although without attaching conditions), will, in the absence of words of contrary import, establish a like intent in those other devises, and the beneficiaries will take in fee.

The precise point was passed upon in *Cook et al.* vs. *Holmes, 11 Mass. 529* (decided in 1814). Two parcels of land were devised to children, upon condition of payment of certain sums, and a third parcel to a grandson, without condition and without words of inheritance. The court said:

> "Here two estates in fee are created by the will clearly according to the intention of the testator; and yet he left that intention wholly unexpressed by any words made use of by him in the respective devises. It is hence probable that the testator did not know the use of technical language; and we can not infer an intention to give a life estate only to Gregory, merely because we find no estate whatever expressed."

To the same effect and in recognition of the same principle is Butler *vs.* Butler, 2 Mackey (D. C.), 96, 104, where a devise to two sons without words to indicate what estate was to be taken by them was held to be an estate in common in fee simple, because of the meaning to that effect given to similar language in another clause. The court said:

> "And inasmuch as he used the same phraseology in the following clause we think he used it in the same sense there. The authorities seem abundantly to justify us in translating a meaning which the context gives to language employed in one clause, to the same language employed in another."

To like effect is White *vs.* Crenshaw, 5 Mackey (D. C.) 113, where the court said:

> "In this case we find that when the testatrix gave a piece of land to two nephews in Baltimore by just the same language, and without the use of the word heirs or any equivalent, she *assumed* that she had given them a fee simple, and therefore went on to state what should be done in case of the death of either before they became 21 years of age. We learn in this way, what the testatrix supposed and intended to be the effect of a devise of a described piece of property, without using words of inheritance or any particular equivalent for them, and we must be guided by her lexicon, and understand her language as she defines it. We infer, therefore, from the devise that she supposed she had given a fee simple to Mrs. Emily Johnson by the same language."

And the court held that Mrs. Emily Johnson took a fee simple.

The case of *King* vs. *Ackerman*, *supra*, is also analogous, and is authority for us on this point, as on others. There the testator had devised to his son one piece of real estate "to do and dispose of as he may think proper," and another piece without such words. After deciding that the power of disposition gave a fee in the first parcel, the court said:

> "Courts have always been *astute*, as we have said, to find reasons for rescuing a will from the artificial rule established in favor of the heir at law, and will not even be *acute* in searching for reasons to restore its force, where the statute has not abolished it—"

and held that the devisee took the second parcel also in fee.

The decision in Cook *vs.* Holmes, delivered by Ch. J. Parker in 1814, has never been attacked or doubted in any court so far as we have ascertained, and, we submit, is to be taken as having settled the law on the point involved. If

followed it would seem to control this case, for if the court shall find that the legal, irrefutable effect of the charge upon Mrs. Quigley was to fasten a meaning on the words of the devise to her which the law must respect, it will not attach a different meaning to similar language in another devise.

We submit that the decree below should be reversed and the will construed as giving a fee simple to each devisee.

O. B. HALLAM,
Attorney for Quigleys.
ARTHUR A. BIRNEY,
HENRY F. WOODARD,
Attorneys for Wm. H. McCaffrey.